BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF VERIZON DELAWARE INC., FOR A CABLE TELEVISION FRANCHISE TO SERVE THE UNINCORPORATED AREAS OF THE STATE OF DELAWARE (FILED JANUARY 23, 2006)	)	PSC DOCKET NO. 06-40

FINDINGS, OPINION, AND ORDER NO. 7074

BEFORE: ARNETTA McRAE, Chair
JAYMES B. LESTER, Commissioner
JOANN T. CONAWAY, Commissioner
J. DALLAS WINSLOW, Commissioner
JEFFREY J. CLARK, Commissioner

This 21st day of November, 2006, the Commission finds, determines, and Orders the following:

I. INTRODUCTION

1. By this Order, the Commission grants to Verizon Delaware Inc. ("VZ-DE" or "Verizon") a franchise (Exhibit "A") to construct and operate a cable television system to provide video services to consumers in the unincorporated areas of this State.[1] The Commission finds that Verizon has the financial and operational capabilities to likely fulfill the terms of its franchise. In addition, after considering the application, and the presentations and comments made by VZ-DE, numerous members of the public, incumbent cable service providers, and the Commission Staff, the Commission determines that the public need and interest will be served by the grant of the attached franchise to Verizon.

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[1] See 26 Del. C. §§ 601(a)-(b), 603(b)-(c).

II. BACKGROUND

2. In November 2005, the Commission, in response to a request made by Verizon, solicited applications for a cable franchise to serve the unincorporated areas of the State. See PSC Order No. 6763 (Nov. 8, 2005).[2]

3. In January, 2006, Verizon filed an application to be awarded the solicited franchise.[3] Although the application sought a franchise for all the unincorporated areas within the State, the application, in detailing Verizon's proposed scope of service, focused on an "initial service area." That "initial service area" was composed of nine areas disbursed throughout the State, each now being served by one of Verizon's telecommunications "wire centers."[4] As later fleshed out in VZ-DE's draft franchise agreement, Verizon would provide its video services to significant numbers of subscribers in

[2] See 26 Del. C. § 601(c). The unincorporated areas of the State are not presently devoid of cable television services. Several "incumbent" cable system operators already provide cable television services in the unincorporated areas of the State under various franchises previously granted (and later renewed) by this Commission. In some cases, the franchise areas under those prior awards encompass large portions of the unincorporated areas in this State. However, no previously granted franchise contains a franchise area covering all the unincorporated areas. In addition, in several instances, the franchise areas previously awarded to differing cable operators overlap.

[3] See Verizon Delaware Inc.'s Application for a Cable Television Franchise (filed Jan. 23, 2006) (Exh. 1).

[4] See Application ¶ 1 & Attachment I. The use of "wire centers" as the construct for these initial service areas reflects the Fiber Optic ("FiOS") or Fiber to the Premises ("FTTP") network that will serve as the platform for Verizon's delivery of video services to consumers. As described by Verizon, the FTTP platform is a fiber optic upgrade or expansion of its telecommunications network. The fiber-optic based platform, which will be used to provide not only video but also broadband information services and telecommunications services, will continue to emanate from the carrier's current telecommunications "wire centers." These "wire centers" – used for switching in the traditional telephone network – will thus become a part of the local distribution network for the video services.

the residential areas within the initial service area and may make its services available to businesses in the initial service area within two years. At the end of the first five years, Verizon would offer service throughout this initial service area – except in those areas where neither customer contributions nor residential density require expansion under its “line extension policy.[5] Beyond this initial service area, Verizon could choose, but could not be compelled, to extend its video services to other “additional” service areas.[6]

4. Pursuant to 26 Del. C. § 603, the Commission sat to consider VZ-DE’s application at a duly-noticed open public hearing on April 11, 2006. See PSC Order No. 6858 (Mar. 14, 2006) (prescribing notice of hearing on Verizon’s application). At that hearing, the Commission entertained a presentation from Verizon and considered comments made by two members of the general public and by City Council President Theodore Blunt representing the City of Wilmington and the Delaware League of Local Governments. The Commission also heard the positions of Comcast of Delmarva, Inc. (“Comcast”), the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia (“Cable Association”), and the Public Advocate. It also had recommendations from Staff.[7] Ultimately, the Commission decided to continue its hearing and to schedule additional opportunities for

[5]Draft Franchise Agreement (Aug. 17, 2006) at § 3.2.1.

[6]Draft Franchise Agreement (Aug. 17, 2006) at § 3.2.3.

[7]See Tr. 6-43. The “record” at the hearing also included 17 written exhibits. Several of those exhibits were pieces of correspondence speaking to Verizon’s application. Those documents are contained in the docket file. The hearing transcript and such documents are part of the record in this proceeding.

public comment during sessions to be held in each of the three counties. In addition, VZ-DE had not filed a draft franchise document with its application. The Commission thought it might be more efficient to have such draft franchise document publicly available before these additional sessions began. With it, the public, cable incumbents, and Staff could comment on specific terms in the draft document during the expanded period for comments. See PSC Order No. 7006 (Aug. 22, 2006) (explaining April 11, 2006 decision).

5. After discussions with Staff, Verizon submitted its draft franchise document on August 17, 2006. See Order No. 7006 (setting details for eliciting further comments and summarizing Staff's reservations about two particular areas in the draft franchise document). The Commission's Hearing Examiners held the duly (and widely) noticed comment sessions in the three counties on September 25, 26, and 27, 2006. They filed a Report summarizing the identity of the numerous participants and the content of the comments (both oral and written) offered during the comment and reply period.[8] The Commission Staff also offered its recommendations about Verizon's

[8] See Report of Hearing Examiner R. Price (Oct. 23, 2006). At least one Commissioner attended each of these additional public sessions. During the extended comment period, comments were forthcoming from members of the general public, numerous legislators, other public officials, Comcast, and the Cable Association. HE Report 2-8. During the sessions, Verizon also repeated its presentation explaining its proposed cable television service. In addition, at the end of the process, Verizon offered a written reply to the other participants' comments. HE Report at 8-12. Verbatim transcripts of the public comment sessions were prepared. Tr. 58-95 (Sussex); 96-141 (Kent); & 142-90 (New Castle). In addition, the Commission received numerous additional written letters and e-mails during the extended comment period. They are contained in the docket file. The Commission now includes the Hearing Examiner's Summary Report, the transcripts, and all the submitted written documents and comments (including Verizon's reply) into the record in this matter.

franchise request and its draft franchise document. Overall, Staff recommended that Verizon's application be granted. However, Staff did recommend that the franchise document be modified to include several reporting requirements related to service area "build-out" and expansions. Under Staff's proposed changes, Verizon would have to make specific regular status reports about its "build-out" in its designated "initial service area," followed with a fourth year report about its plans for expansion beyond those initial nine wire center areas over the ensuing five years.[9] As Staff explained it, such reporting requirements would allow the Commission to monitor whether Verizon was fulfilling its commitments about the scope of services in its initial area, but also whether in extending its services it was indeed meeting two important obligations: its franchise duty not to unreasonably discriminate in providing access to its video services and its similar federal statutory obligation not to deny access to its services to any group of potential residential customers because of the income levels of the residents of the local area in which such group might reside.[10] Staff also recommended modifications to the draft franchise provisions related to Public, Educational, and Governmental ("PEG") channel access.[11] Staff first suggested that in

[9]See Staff Memorandum at 6-7 (Oct. 23, 2006).

[10]See 47 U.S.C. § 541(a)(3).

[11]The 1974 State Cable Act does not speak to PEG channel obligations for cable system operators. However, under federal law, local franchising authorities have the power to include franchise terms ensuring that cable operators will make available both channel capacity and associated production support for use by the public, educational institutions, and government units. See 47 U.S.C. §§ 531, 541(a)(4)(B). The Commission has historically

lieu of Verizon’s somewhat complicated scheme for calculating its PEG channel grant contributions, Verizon should simply agree to have its franchise term mirror the PEG commitments (both in terms of channel capacity and dollar contributions) that prevail under one incumbent cable operator’s existing franchise. Similarly, Staff recommended that the Commission reject the draft franchise terms that seemingly would make it a regulatory obligation for cable operators to “interconnect” with Verizon so that it could disseminate PEG programming produced, or carried by, other cable systems. But in a broader context, Staff urged the Commission – regardless of how Verizon’s PEG channel commitments might be crafted for the short-term - to endorse a franchise term that would allow the Commission, after 2012, to seek renegotiation of Verizon’s PEG channel obligations. In Staff’s view, such a PEG renegotiation provision would be conditional: it would be triggered only if all incumbent cable operators also now agree to change their existing franchises to include a similarly-timed renegotiation process for their PEG channel obligations. As Staff saw it, if all wired video providers agreed to such renegotiation terms, then the Commission would have the opportunity to take a later “global” look at how to provide (and fund) PEG programming to citizens, especially if demand for PEG access might move from its present somewhat moribund State.[12]

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approved cable franchises that include various PEG commitments by the franchised operator.

[12]See Staff’s Memo at 7-8. Staff also recommended that Verizon commit to weekend hours in its office operations comparable to the office hour requirements applicable to the incumbent Comcast. Id. At 8. Finally, Staff proposed that once Verizon entered the video services market, the Commission

6. Thereafter, both Comcast and the Cable Association submitted further written comments, responding to both Verizon’s earlier reply comments and Staff’s recommendations. That correspondence reiterated many of the issues that the cable entities had raised during the earlier comment period before the Hearing Examiners. The cable entities again urged the Commission to have Verizon include in its franchise specific, concrete commitments related to its “build-out” of plant and service in both the defined “initial service area” and the remainder of the franchise area it had sought. They pointed to franchise agreements for counties in neighboring States where the Verizon company had included pre-set timetables for expanding its video services through not only the designated initial service area but also through additional service areas. And they again called for the Commission to rework Verizon’s proposed “line extension” policy describing how many homes per mile must exist before Verizon can be obligated to extend its services. Under Verizon’s draft document, homes already served by another cable operator would be excluded from the density count. That qualifier, the cable entities said, renders the “mandatory” extension policy almost illusory as applied to Verizon’s initial service area where incumbent cable operators likely already serve a significant number of homes. Instead, Verizon would be free to pick and choose where it wants to “overbuild” and would likely select only the most revenue-attractive areas. And finally, the cable entities repeated their

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should explore lifting various administrative regulatory requirements imposed on incumbent cable operators but not on Verizon.

objections to the PEG terms in Verizon's draft franchise as those terms imposed an interconnection obligation on other cable operators and conditioned Verizon's PEG grant contribution on other cable operators' first making "competitively neutral" PEG payments measured on a "per subscriber" basis.

7. On October 31, 2006, the Commission reconvened its previously-continued public hearing on the application. It again heard from Verizon, Comcast, the Cable Association, and City Council President Blunt.[13] Staff also expanded on its reasoning for its previously-proffered recommendations. During the course of the hearing, Verizon offered amendments to its draft franchise document to respond to Staff's recommendations and several issues raised by the cable entities. Thus, Verizon offered:

> (a) to incorporate into its franchise Staff's recommendations concerning various reporting requirements concerning its build-out and service expansions;
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> (b) to modify its PEG channel commitments to delete any mandatory interconnection obligation and to have its overall PEG terms track the PEG commitments set forth in paragraph 11(b) of the current franchise held by Comcast New Castle County (PSC Order No. 6775 (Nov. 22, 2005));[14]
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> (c) to revise its definition of its office hours so as to capture weekend hours;
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> (d) to more completely define the "effective date" and "service date" terms as used in the franchise;

[13]Tr. 193-254. The verbatim transcript of the October 31 hearing is made part of the record in this matter.

[14]Verizon had earlier agreed to Staff's recommendation that its PEG obligations be subject to renegotiation after 2012, provided that all other cable operators committed to a similar PEG renegotiation provision.

(e) to revise its "line extension" policy terms so that the density calculation will be based on the total number of homes per mile, whether or not any such home might already be served by another cable system; and

(f) to delete the franchise provision that had been read as allowing Verizon to "offset" any actual PEG grant contribution against its franchise fee liability.[15]

8. At the close of the hearing, the Commission, by a unanimous vote taken and recorded in public, determined to award Verizon a franchise to provide video services in the unincorporated areas of the State. Verizon will do so under the franchise agreement proposed by it, but with the subsequent changes offered by Verizon on October 31 and incorporating the recommendations made by Staff.[16] That franchise document (as so modified) is attached as Exhibit "A." It is approved and adopted by the Commission. This Order reports the criteria (and findings) which support the award of the franchise to Verizon.

III. FINDINGS AND OPINION

A. Public Need for the Proposed Franchise

9. The Commission finds a "public need" for Verizon's franchise. Even before it became a federal policy,[17] this Commission committed to the concept of non-exclusive franchises for cable service, with the attendant possibility of several cable operators competing to acquire and serve customers in the same area. As the Commission saw it, the crucial public interest is "best served by

[15] Tr. 195-203, 253-54.

[16] Tr. 255-59.

[17] See 47 U.S.C. § 541(a)(1).

giving each applicant the opportunity to serve the area which it seeks to serve and letting the potential customers benefit from any competition which may develop in the overlapping areas."[18] Here, members of the public, public officials, and private organizations – almost with unanimous voice - support Verizon's entry into the market for consumer cable and video services. Even incumbent cable providers support Verizon's application for a franchise, provided that the resulting competition will take place on what they view as a "level playing field." The grant of Verizon's franchise application will serve a public need.

B. Likelihood That Verizon Will Fulfill the Terms of the Franchise

10. Similarly, none of the participants in this matter questioned Verizon's ability (in terms of capital, operational experience, or "corporate" character) to fulfill the terms of the finally approved franchise. Verizon may be new to the cable or video services market but it is no start-up company; it is the incumbent telecommunications provider in this State. And the FTTP platform it will construct is not simply a cable or video system; it is a delivery platform for its upgraded telecommunications and broadband services. The Commission has no reason to question that Verizon has the financial, technical, and operational capabilities to provide its video services in accord with the terms of the approved franchise.

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[18] See PSC Dckt. No. 36-79, Findings & Opinion of the Commission at ¶ 16 (Dec. 9, 1980) (PSC Order No. 2163).

C. Service Areas and Expansion

11. As noted earlier, with just a few exceptions, all the participants support Verizon's entry into the consumer video services market. Rather, the flash-point between Verizon and many participants is what should be the extent of this entry. Some members of the public ask that their neighborhoods be included in Verizon's "initial service area" so that they will have the option of choosing one or another video provider. Similarly, several public officials question Verizon's choice of the initial wire center areas, suggesting that any franchise should be withheld until Verizon can say when it will serve their particular County. And several (including the cable entities and City Council President Blunt) call upon the Commission to compel Verizon to commit to a schedule for the phased "build-out" of its FTTP network throughout all the unincorporated areas of the State, so that within a reasonable period of time, all consumers will have the ability to choose between competing "over-built" video and cable providers. They say that if such ex ante build-out schedules are not imposed, Verizon will be able to focus its services on "wealthy areas" and leave consumers in poorer neighborhoods with neither "choice," "advanced offerings," or the lower prices wrought by head-to-head cable competition.

12. After careful consideration of the issue (and the various comments), the Commission will accept Verizon's franchise provisions related to service expansion, as amended by Verizon on October 31, and as modified by Staff's recommendations for particular reporting requirements. Accordingly, under its franchise, Verizon is obligated

to expand its video services in its initial service area of nine wire centers consistent with its 35 homes per mile line extension policy. Within five years, Verizon shall have its video services available throughout the entire initial service area – except in those areas where the residential density was insufficient under the line extension policy to compel expansion.[19] Thereafter, Verizon can exercise its business judgment to determine the locale and scope of expansion beyond the "initial service area."[20]

13. The Commission's decision to accept Verizon's expansion terms is driven by the desire to promote competitive entry into the video services market so that real competition (and the effect such can have on prices and service) will become a reality. But it is also informed by how the Commission has historically dealt with requirements related to cable network expansions. In the past, in almost all instances, the Commission has not imposed on cable operators <u>ex</u> <u>ante</u> time schedules for when they must expand their delivery networks to fully "fill-out" newly granted franchise areas. Instead, the Commission has looked to "line extension policies" as the appropriate benchmarks for obligatory build-outs within a franchise area, thus allowing economic feasibility to dictate when service expansions are required.[21] Verizon's franchise terms related to

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[19]Final Franchise §§ 3.2.1, 3.2.2.1. As noted earlier, under Verizon's amended line extension policy, it cannot exclude homes served by another cable provider in calculating the number of homes per mile.

[20]Final Franchise § 3.2.3.

[21]<u>See</u> <u>e.g.</u>, PSC Orders Nos. 2977 (Sept. 6, 1988) ("Commission will require all cable television companies to serve all their franchise areas under the terms of their effective line extension policies"); 3108 (Nov. 7,

service expansion, particularly in light of the modified line extension policy, are consistent with the Commission's traditional views about when operators should be required to expand their service footprint.

14. However, Verizon's choices about where it will offer its services are not without a constraint. Since 1984, federal law has empowered this Commission to ensure that a cable operator does not deny any group of potential residential cable subscribers access to its cable services because of the income of the residents of the local area in which such group resides.[22] The Commission believes that this statutory "anti-redlining" obligation is an enforceable part of Verizon's larger franchise duty not to unreasonably discriminate in the availability of its video services.[23] Staff's reporting requirements, now endorsed by the Commission and accepted by Verizon,

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1989) (cable operator "will at all times serve all its franchise area under the terms of its line extension policy on file with the Commission"); 3110 (Nov. 7, 1989) (same condition but also asking Staff recommendations on whether cable companies' line extension policies should be modified to require the "counting" of homes served by another cable system). It might be asserted that this use of line extension policies, rather than ex ante construction schedules, to govern franchise area build-outs is consistent with the statutory dictates of the State Cable Act. Section 603(11) does speak of including such phased construction schedules in a franchise application. But, section 604(3) links the need for such schedules with fixed dates for the extension of construction and service "when and to the extent required by the Federal Communications Commission." No one has suggested that anyn federal statute, or FCC regulation, compels a local franchising authority to impose pre-set construction schedules that obligate the operator to fully fill-out its franchise area. The Commission believes that franchising authorities have discretion to decide how to deal with obligatory service expansions and the Commission's long-standing choice to rely on line extension policies remains consistent with both federal and state requirements.

[22] See 47 U.S.C. § 541(a)(3).

[23] Final Franchise § 3.2.4.

will provide a means for the Commission to monitor whether Verizon's expansions – both within the initial service area and in any later additional service areas – are consistent with these statutory and contractual duties. If the Commission, either through complaint or its own review, suspects that Verizon's decision about network expansion have, or will, run afoul of these anti-discrimination principles, the Commission stands ready to undertake an investigation. And if a breach is indeed found, the Commission will direct Verizon to take specific acts to comply with its anti-discrimination duties.[24] Of course, the Commission expects that Verizon will adhere to its obligations so that such an inquiry is never needed.

D. PEG Channel Obligations

15. At the October 31 hearing, Verizon offered to amend its original draft franchise to delete its originally proposed PEG channel commitments in favor of PEG provision terms mirroring those contained in Comcast New Castle County's current cable franchise (PSC Order No. 6775 (Nov. 22, 2005)). Given that the Commission just accepted those PEG provisions in renewing Comcast New Castle County's franchise, the Commission sees no reason to reject Verizon's adoption of such PEG channel commitments.[25]

[24]See 26 Del. C. §§ 605(1), 606.

[25]Some have suggested that it might be problematic to allow Verizon – with a franchise stretching throughout the State – to have the same PEG contribution level ($100,000) as a cable operator serving only a portion of one county. However, given that PEG access has not been active under any of the Commission's franchises, it is difficult for the Commission to have a benchmark to judge the "adequacy" of any PEG contribution amount.

16. However, as Staff suggests, the comments focusing on what PEG channel obligations Verizon should bear highlight a somewhat larger issue. The Commission has traditionally included PEG channel obligations in all its cable franchises. However, according to Staff, the use of such PEG channels has been somewhat of a "non-starter" in the context of service to the unincorporated areas. County Executive Coons reports that New Castle County is currently exploring launching a PEG channel for the unincorporated areas with that County. But until this recent report, the Commission Staff cannot recall any other request made to this Commission to utilize the PEG channel obligations in any current franchise issued by this Commission.

17. The Commission endorses Staff's proposal that the Commission pursue the opportunity to revisit – sometime after 2012 - the PEG channel obligations under <u>all</u> the cable franchises it has issued, including the one now issued to Verizon. Things might change by then, and the public, educational institutions, and governmental units might then be demanding increased access to PEG channels. If so, the Commission would want the opportunity to seek renegotiations of current PEG channel obligations (including channel capacity and production facility contributions) in light of that increased demand. The Commission cannot now say what new commitments it might seek in such later renegotiations. What it desires now is the ability, if PEG access demand does indeed change, to renegotiate each franchise holder's PEG channel commitments.

18. Verizon has agreed in its franchise to such a PEG channel review after 2012. Of course, the Commission believes that Verizon

should be held to that term, only if all other cable franchise holders now agree to modify their current franchises to include similar terms allowing for similar renegotiations of PEG commitments after 2012. Other cable system operators should promptly notify the Commission whether they would agree to modify their franchises to allow for PEG channel renegotiations after 2012.

E. Miscellaneous

19. The Cable Association has suggested that Verizon's original application was mortally deficient in that it did not include, on a publicly available basis, plats of its proposed receiving antennas, head-end equipment, studio, office, maintenance facilities, and truck routes for its cables. See 26 Del. C. § 602(8). Verizon's response was that it is willing to provide such type of information to the Commission, but given that its emerging FTTP network serves both as a telecommunications network as well as a video services platform – it is extremely reluctant to make such information about the location of its network facilities "public." In these post-September 11, 2001 times, there can indeed be significant and legitimate security concerns about whether information related to the operation and location of telecommunications networks should be publicly available from State agencies.[26]

20. In this context, the Commission finds that any failure to submit a public copy of the plats required by 26 Del. C. § 602(8) is

[26] See 29 Del C. § 10002(g)(16)a.2. (defining as "non-public" records diagrams related to telecommunications' network facilities and switching equipment where disclosure would reveal the building's or structure's "specific location" and such record could facilitate the planning of a terrorist attack).

not grounds to reject either Verizon's application or its proposed franchise. Verizon has identified the nine wire centers that will be included within its initial service area. At this juncture, the exact location of Verizon's office and its other facilities, or the routes for its new FiOS network trunks, does not seem to be the kind of information that would make any material difference in deciding whether to grant Verizon a video service franchise. However, the Commission expects that if it (or its Staff) requires such facilities information in order to monitor Verizon's performance under its franchise or for some other legitimate purpose, then Verizon will promptly file it with the Commission, accompanied by any appropriate confidentiality claims.

Now, therefore, **IT IS ORDERED:**

1. That, pursuant to 26 Del. C. § 601 and for the reasons set forth in the body of this Order, Verizon Delaware Inc. is hereby granted a franchise to construct and operate a cable television or video service system in the unincorporated areas of the State of Delaware.

2. That Verizon Delaware Inc. shall operate such system and provide its cable television and video services under the terms of the Franchise Agreement attached hereto as Exhibit "A."

3. That the Commission retains the power and jurisdiction to monitor and enforce the terms of the above franchise under the provisions of 26 Del. C. §§ 605-610.

4. That the franchise here granted and the franchise agreement attached hereto shall be effective upon acceptance by Verizon Delaware Inc.

5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jeffrey J. Clark
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

<u>E X H I B I T</u> "<u>A</u>"